

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington corporation,

Plaintiff,

V.

MOTOROLA, INC., MOTOROLA MOBILITY
LLC, and GENERAL INSTRUMENT
CORPORATION..

Defendants.

CASE NO. C10-1823-JLR

DEFENDANTS' MOTION TO SEAL
DOCUMENTS AND TRIAL TESTIMONY
AND EXCLUDE UNAUTHORIZED
PERSONS FROM THE COURTROOM
DURING TESTIMONY REGARDING
TRADE SECRETS

**NOTE ON MOTION CALENDAR:
Friday, November 9, 2012**

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CASE NO. C10-1823-JLR

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

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315 FIFTH AVENUE SOUTH, SUITE 1000
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Telephone: (206) 676-7000
Fax: (206) 676-7001

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7 **OTHER AUTHORITIES**

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1 **I. INTRODUCTION**

2 Pursuant to Western District of Washington Civil Local Rule CR 5(g)(2), Defendants
 3 Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility LLC, and General Instrument
 4 Corporation (collectively “Motorola”) respectfully move for leave to file under seal confidential
 5 exhibits and summary exhibits that will likely be used at trial, and further respectfully move to
 6 exclude from the courtroom during certain confidential testimony persons not authorized by the
 7 Protective Order to hear such testimony, and to seal that testimony and the transcripts of that
 8 testimony. Among the documents or categories of information¹ Motorola seeks to have sealed
 9 are:

10 1. Highly confidential information about licenses between Motorola and various third parties,
 11 including specific licenses, license terms and licensing negotiations;

12 2. Highly confidential internal Motorola information relating to past and projected profits,
 13 revenues, and sales data;

14 3. Highly confidential information relating to settlement negotiations between Microsoft and
 15 Motorola;

16 4. Prior sealed confidential testimony and reports from related actions;

17 5. Confidential third-party technical information;

18 6. Highly confidential information contained in the depositions of party and third-party
 19 witnesses, some of whose testimony is being offered through deposition designation; and

20 7. Testimony from both fact witnesses and expert witnesses, including Motorola fact witness
 21 Kirk Dailey, Microsoft experts Matthew Lynde and Kevin Murphy, and Motorola experts
 22 Charles R. Donohoe and Michael J. Dansky, regarding or disclosing such highly
 23 confidential information.

24 As explained in detail below, there are compelling reasons for sealing certain exhibits and
 25 categories of exhibits and closing the courtroom during the presentation of evidence and testimony
 26 regarding those categories. In this Motion, which Motorola believes substantially identifies the

¹ Motorola understands that, under the local rules, it must provide “a specific description of particular documents or categories of documents a party seeks to protect.” *See CR 5(g)(4)*. As it is not yet clear exactly which exhibits either party will actually use at trial, Motorola has been as specific as possible.

1 exhibits containing Motorola or third-party confidential information² for which there are
 2 compelling reasons to seal, Motorola has identified approximately 101 out of the 3300 exhibits on
 3 the Joint Trial Exhibit List (Dkt. No. 493, Ex. 1).³ Should Motorola identify any additional
 4 exhibits it believes should be sealed at trial, Motorola will promptly bring those documents to the
 5 Court's attention. To the extent that it is not possible to say with certainty in advance of trial
 6 which documents the parties will actually use, Motorola proposes that the Court permit the parties
 7 to submit, no later than 8:00 AM each morning of trial, copies of additional exhibits they
 8 anticipate using that day, that they are seeking to seal, and that have not already been identified in
 9 a motion to seal, together with specifics regarding the basis for sealing.

10 **II. LEGAL STANDARD**

11 Although historically courts have recognized a general right to inspect and copy public
 12 records and documents, including judicial records, the Supreme Court has explained that “the right
 13 to inspect and copy judicial records is not absolute. Every court has supervisory power over its
 14 own records and files, and access has been denied where court files might have become a vehicle
 15 for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (holding that
 16 the court of appeals erred in reversing the district court’s decision not to release tapes in its
 17 custody which were used at trial).

18 In discussing examples of improper purposes, the Court indicated that courts are not to
 19 serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*
 20 Accordingly, federal law recognizes that courts should protect trade secrets or other confidential
 21 commercial information by reasonable means, permitting the filing under seal of documents
 22 containing such information. *See Fed. R. Civ. P. 26(c)(1)(G)* (stating that a court may require that

23
 24
 25 ² Microsoft has indicated that it is not joining Motorola’s Motion. Accordingly, Motorola presumes that Microsoft
 26 will take its own actions to protect its confidential information.

³ A list of specific documents that Motorola is moving be sealed is attached as Exhibit A. Highlighted documents
 are those that the Court has previously sealed under the “compelling reasons” standard.

1 “a trade secret or other confidential research, development, or commercial information not be
 2 revealed or be revealed only in a specified way”).

3 In the Ninth Circuit, a party seeking to seal a judicial record must articulate justifications
 4 for sealing that outweigh the public policies favoring disclosure by stating “compelling reasons”
 5 for sealing. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)
 6 (“In general, ‘compelling reasons’ . . . exist when such ‘court files might have become a vehicle
 7 for improper purposes,’ such as the use of records to . . . release trade secrets.”) (citing *Nixon*, 435
 8 U.S. at 598); *see also In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Lit.*, 686 F.3d
 9 1115, 1119 (9th Cir. 2012). Similarly, Local Rule CR 5(g)(2) states that, with regard to
 10 dispositive motions, the presumption of public access to the Court’s files “may be overcome only
 11 on a compelling showing that the public’s right of access is outweighed by the interests of the
 12 public and the parties in protecting the court’s files from public review.” As this Court has
 13 recognized, the Ninth Circuit has adopted the Restatements’ definition of “trade secret.” *See*
 14 *Ultimate Timing, L.L.C. v. Simms*, No. C08-1632 MJP, 2010 WL 786021, at *1-2 (W.D. Wash.
 15 Mar. 4 2010) (quoting *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). According to this
 16 definition, a “trade secret may consist of any formula, pattern, device or compilation of
 17 information which is used in one’s business, and which gives him an opportunity to obtain an
 18 advantage over competitors who do not know or use it.” *Clark*, 453 F.2d at 1009 (quoting
 19 *Restatement of Torts* § 757, cmt. b); *see also In re Elec. Arts, Inc.*, 298 F. App’x 568, 569-70
 20 (9th Cir. 2008).

21 Applying this definition, the Ninth Circuit has explicitly found that “a detailed plan for the
 22 creation, promotion, financing, and sale of contracts” constitutes a trade secret. *Clark*, 453 F.2d at
 23 1009. The Ninth Circuit has similarly found that “pricing terms, royalty rates, and guaranteed
 24 minimum payment terms” in licensing agreements is “information that plainly falls within the
 25 definition of ‘trade secrets.’” *In re Elec. Arts*, 298 F. App’x at 569-70. Under the “compelling
 26 reasons” standard, moreover, numerous district courts in the Ninth Circuit have sealed confidential

1 information relating to internal finances (including revenues and profits), product specifications,
 2 and licensing information. *See, e.g., Hendrix v. Branton*, C93-537-TSZ-RSM, 2012 WL
 3 2455741, at *4 (W.D. Wash. June 26, 2012) (finding “compelling reasons” for sealing settlement
 4 agreement containing a confidentiality provision prohibiting the disclosure of financial terms in
 5 the agreement except under certain circumstances); *Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500-
 6 WQH-BGS, 2012 WL 1899838, at *2-4 (S.D. Cal. May 24, 2012) (sealing declarations and
 7 documents containing cost analysis relating to sales and business data and product development
 8 plans); *Bean v. John Wiley & Sons, Inc.*, No. CV 11-08028-PCT-FJM, 2012 WL 1078662, at *5-
 9 6 (D. Ariz. Mar. 30, 2012) (sealing “precise revenue results” and “exact sales and production
 10 numbers,” in charts summarizing defendant’s sales and revenue figures broken out by product);
 11 *TriQuint Semiconductor v. Avago Techs., Ltd.*, No. CV 09-1531-PHX-JAT, 2011 WL 6182346, at
 12 *3-7 (D. Ariz. Dec. 13, 2011) (sealing documents containing sensitive financial information and
 13 licensing information); *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2012 WL
 14 3283420, at *9 (N.D. Cal. Aug. 10, 2012) (sealing details of license agreement); *Network
 15 Appliance, Inc. v. Sun Microsystems Inc.*, No. C-07-06053 EDL, 2010 WL 841274, at *2 (N.D.
 16 Cal. Mar. 10, 2010) (sealing material that would subject third parties to competitive harm).
 17 Indeed, “[w]here [] material includes information about proprietary business operations, a
 18 company’s business model or agreements with clients, there are compelling reasons to seal the
 19 material because possible infringement of trade secrets outweighs the general public interest in
 20 understanding the judicial process.” *Selling Source, LLC v. Red River Ventures, LLC*, No. 2:09-
 21 cv-01491-JCM-GWF, 2011 WL 1630338, at *6 (D. Nev. Apr. 29, 2011).

22 In *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 5:11-cv-01846-LHK, 2012 WL 3283478
 23 (N.D. Cal. Aug. 9, 2012), the district court recently addressed similar issues regarding sealing
 24 documents in the context of a major trial involving patent issues. In that case, both parties (along
 25 with numerous third parties whose information was to be used at trial) filed motions to seal
 26 confidential documents, including documents containing sensitive financial data, source code,

1 proprietary marketing reports, and terms of licensing agreements. Collectively, the motions
 2 related to three categories of documents: (1) party documents likely to be used at trial; (2)
 3 documents used exclusively in pre-trial motions; and (3) third party documents to be used by
 4 either party at trial. *Id.* at *1.

5 In an extensive and detailed Order, the Court granted-in-part and denied-in-part the various
 6 motions. Among other materials, the Court sealed: information relating to the parties' production
 7 and supply capacities, *id.* at *2; party proprietary source code, *id.* at *5; and information from a
 8 market research report prepared by a third party for one of the litigants, *id.* at *6.⁴ The Court also
 9 held that all financial terms of licensing agreements, including pricing terms, royalty rates and
 10 minimum payment terms, were trade secrets under Ninth Circuit law and thus should be sealed.
Id. at *6, *10.

12 **III. BACKGROUND**

13 **A. The Protective Order in This Action Both Permits and Requires Motorola to File This Motion For Leave to File Under Seal**

14 Throughout this litigation, the parties have produced many confidential and highly
 15 sensitive documents relating to their business and licensing practices and histories, business
 16 strategy, financial information, and technical developments, including sensitive documents that
 17 contain the highly confidential information of third parties. Moreover, other third parties, such as
 18 MPEG LA, Via Licensing and MOSAID, have produced additional confidential and highly
 19 sensitive documents relating to their own business and licensing practices in response to
 20 subpoenas issued by the parties. In order to protect such confidential material, Microsoft and
 21 Motorola entered into a stipulated Protective Order, which was approved by the Court on July 21,
 22 2011. (Dkt. No. 72.)⁵ This Protective Order outlines categories of material that should be
 23

24 ⁴ The court did not, however, find that the parties had provided sufficient "compelling reasons" to seal internal
 25 market surveys or financial data related to profit, profit margins, cost, or unit sales data. *Id.* at *3-5.

26 ⁵ On October 3, 2012, the Court amended the Protective Order to permit two of Microsoft's in-house attorneys to
 have additional access to confidential materials. (See Dkt. No. 447.) In arguing that the Protective Order should be
 amended, Microsoft stated that these two attorneys "will not be permitted to disclose this information to others at

1 maintained in confidence, along with procedures for sealing confidential material when included
 2 in documents filed with the Court. Specifically, paragraph 1 specifies that:

3 Confidential Business Information is information which has not been made public
 4 and which concerns or relates to the trade secrets ... amount or source of any
 5 income, profits, losses, or expenditures of any person, firm, partnership,
 6 corporation, or other organization, the disclosure of which information is likely to
 have the effect of causing substantial harm to the competitive position of the
 person, firm, partnership, corporation, or other organization from which the
 information was obtained....

7 *Id.* at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS
 8 INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6
 9 specifies that:

10 (1) Confidential Business Information pertaining to licensing or other
 11 commercially sensitive financial information shall not be made available under
 12 this paragraph 6 to such designated in-house counsel; the supplier shall designate
 13 such Confidential Business Information pertaining to licensing or other
 14 commercially sensitive financial information as “[SUPPLIER’S NAME]
 CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’
 EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide a
 redacted version of such document that may be disseminated to the two in-house
 counsel designated under this paragraph 6....

15 *Id.* at 4. Finally, Paragraph 2(a) of the Protective Order governs the sealing of documents, and
 16 states in relevant part that:

17 During the pre-trial phase of this action, such information, whether submitted in
 18 writing or in oral testimony, shall be disclosed only *in camera* before the Court
 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules
 19 of the United States District Court for the Western District of Washington.

20 *Id.* at 2.

21 Thus, the Protective Order provides that Motorola may request to seal documents by
 22 formal motion pursuant to Rule 5(g) of the Local Civil Rules of the Western District of
 23 Washington. The Protective Order similarly envisions that confidential information will need to
 24 be discussed at trial, and contains provisions relating to the confidentiality of sealed trial
 25 proceedings. (*See, e.g.*, Dkt. No. 72 at ¶ 7 (discussing “confidential portion[s] of the trial”).)

26 Microsoft or Motorola, or use this information for any purpose other than for this litigation – namely, to assist outside
 counsel in preparation for trial and remaining pre-trial motion practice.” (Dkt. No. 434 at 4 (emphasis in original).)

1 Since entry of the Protective Order, Microsoft, Motorola and subpoenaed third parties have
 2 produced hundreds of thousands of pages designated as “Confidential” under the Protective Order
 3 in reliance on the protections offered by that Order and with the expectation that confidential
 4 information would be protected from public disclosure. In cases where Motorola has confidential
 5 licensing or other commercially sensitive financial information of a third party in its files, before
 6 producing such information it has sought and obtained permission from the third party to produce
 7 the information subject to the Protective Order. (*See* Dkt. No. 436.)

8 **B. The Court Previously Has Been Presented With and Has Granted Motions to Seal
 9 Documents Under the “Compelling Reasons” Standard**

10 Local Rule CR 5(g)(3) states that, “[i]f a party seeks to have documents filed under seal
 11 and no prior order in the case or statute specifically permits it, the party must obtain authorization
 12 to do so by filing a motion to seal or a stipulation and proposed order requesting permission to file
 13 specific documents under seal.” During oral argument on October 18, 2012, the Court advised the
 14 parties that it would be applying the Ninth Circuit’s “compelling reasons” standard in considering
 15 whether to seal exhibits. (Oct. 18, 2012 Hr’g Tr. at 2-4.) Over the course of this litigation, the
 16 parties have filed numerous motions to seal documents submitted in support of dispositive motions
 17 (and so falling under the “compelling reasons” standard) (*see, e.g.*, Dkt. Nos. 227, 234, 271, 282,
 18 287, 361, and 372) – motions which the Court has ultimately granted (*see, e.g.*, Dkt. Nos. 294,
 19 336, 337, 338, 384, 385). In addition to granting motions as to highly confidential business and
 20 financial information and licensing practices and history, the Court has found that there is
 21 “compelling reason” to seal Microsoft’s proprietary source code (Dkt. No. 292 at 2), “descriptions
 22 of Motorola’s licensing negotiations and agreements with third parties” (*id.* at 3), and a copy of a
 23 licensing agreement between Motorola and a third party that has been marked as containing
 24 confidential business information, (*id.* at 3-4). Applying the “compelling reason” standard, the

1 Court has also ordered sealed a number of documents, including Motorola's and Microsoft's past
 2 licenses. (See Dkt. No. 384.)⁶

3 **IV. THE COURT SHOULD GRANT THE MOTION TO SEAL**

4 In light of the authority cited above and for the reasons discussed below, the Court should
 5 grant Motorola's motion to seal certain information and categories of information included in
 6 exhibits that will likely be used at trial, and should grant Motorola's motion to exclude
 7 unauthorized persons from the courtroom during testimony regarding that confidential information
 8 and to seal that testimony.

9 **A. Exhibits That Include Information About Licenses and Licensing Terms**

10 Motorola anticipates that the parties will seek to introduce into evidence numerous exhibits
 11 including information about licenses between Motorola and various third parties, or between third
 12 parties and patent pools, and will seek testimony from both fact and expert witnesses about
 13 licensing terms in those agreements. For example, among the many licenses Motorola anticipates
 14 being introduced at trial are Motorola's (or Motorola subsidiary Symbol's) licenses with over 50
 15 companies, including VTech, Benefon OYJ, RIM, Nokia, Ericsson, LGE and IBM.⁷ Indeed, the
 16 Court has already sealed eight of these licenses (which were attached as exhibits to dispositive
 17 motions) under the "compelling reasons" standard. Specifically, under this standard, the Court has
 18 sealed: Exhibit 13 (Motorola-VTech, sealed by Dkt. Nos. 187, 337, and 384); Exhibit 36 (Symbol-
 19 Proxim, sealed by Dkt. No. 336); Exhibit 37 (Symbol-Terabeam, sealed by Dkt. No. 336); Exhibit
 20 38 (Symbol-Hand Held Products, sealed by Dkt. No. 336); Exhibit 2833 (Motorola-RIM, sealed
 21 by Dkt. No. 187); Exhibit 2835 (Motorola-Nokia, sealed by Dkt. Nos. 187, 336); Exhibit 2836
 22 (Motorola-BenQ, sealed by Dkt. No. 384); and Exhibit 2837 (Motorola-Benefon, sealed by Dkt.
 23

24 ⁶ A list of documents that the Court has previously sealed under the "compelling reasons" standard is attached
 25 as Exhibit B.

26 ⁷ Among the Motorola licenses that Motorola anticipates will be offered at trial and will be the subject of trial
 27 testimony are Exhibits 13, 36-38, 2769, 2798, 2802-2805, 2807-2810, 2833, 2835-2837, 2841-2847, 3211-3232,
 3233-3234, 3236-3247, 3352, and 3265. The terms of these licenses are summarized in Exhibit 3334.

1 Nos. 176 and 336). Although many of these agreements indicate that the parties may disclose the
 2 *existence* of the agreements to third parties, the terms of the agreements are almost always kept in
 3 confidence. (*See* Blasius Decl. ¶ 13.⁸) Indeed, even within Motorola, confidential information
 4 regarding licensing terms and conditions is restricted. (*Id.* ¶ 8.) The employees in Motorola's
 5 licensing department understand the extremely sensitive nature of such information, and
 6 understand their duty to not disclose the terms of these agreements. (*Id.*) These agreements are
 7 rarely, if ever, shared outside the legal and licensing departments. (*Id.*)

8 Motorola also anticipates that the parties will seek to introduce into evidence exhibits
 9 including information about the confidential licensing negotiations that led to licenses between the
 10 parties and various third parties. For example, Exhibits 3162-3164 are presentations Motorola
 11 gave to HTC, Samsung, and Apple, respectively, as part of Motorola's ongoing negotiations for
 12 licenses with those three companies. Exhibit 9 is a 2004 letter from Richard Sonnentag, licensing
 13 counsel at Motorola, to an attorney at Option International NV SA, regarding Motorola's response
 14 to Option's licensing proposal.

15 Motorola similarly anticipates that the parties will seek to introduce into evidence licenses
 16 between third parties and patent pools, including Exhibits 2865-2869, which are licenses between
 17 Via Licensing Corporation and Fujitsu Ltd., Japan Radio Co., Ltd., Koninklijke Philips
 18 Electronics N.V., LG Electronics, Inc., and Sony Corporation. While the parties to these licenses
 19 are permitted to publically identify themselves as parties, (*see, e.g.*, Exhibit 2865 at § 5.7), the
 20 licenses contain confidentiality provisions limiting the disclosure of confidential information (*see,*
 21 *e.g., id* at § 5).
 22

23 Public disclosure of such confidential licenses, settlements, and acquisitions, as well as the
 24 confidential negotiations leading to such licenses, settlements, and acquisitions, would have a
 25 profound impact on Motorola and the third parties in future licensing negotiations and settlements

26
 8 “Blasius Decl. ¶ __” refers to the stated paragraph of the Declaration of Brian Blasius, submitted concurrently

1 with others by creating an asymmetry of information. (Blasius Decl. ¶¶ 9-12, 14, 16.) This
 2 asymmetry of information would result in additional leverage and bargaining power and would
 3 lead to an unfair advantage and competitive harm. (*Id.* ¶ 12.)

4 In particular, by learning the details of these licenses, settlements, and acquisitions, and
 5 their relevant negotiations, competitors and potential counterparties to licensing and settlement
 6 agreements with Motorola and all of these numerous third parties would gain an unfair insight into
 7 the Motorola's and third parties' business strategies, licensing strategies, prior royalty grants,
 8 negotiation tactics, and cost/benefit analyses. (*Id.* ¶¶ 9-10, 16.) As Microsoft's General Manager
 9 of Outbound Licensing recently explained in the *Apple v. Samsung* case in support of Microsoft's
 10 motion to seal a confidential license, "[o]ur license agreements are specific to the licensee and
 11 tailored to the particular set of terms and conditions governing the relationships between Microsoft
 12 and the licensee. Public disclosure . . . put[s] Microsoft in a substantially weakened position with
 13 respect to negotiating with entities that have not yet entered into license agreements, thus
 14 decreasing the probability of reaching out-of-court licensing agreements and increasing the
 15 probability of litigation to resolve intellectual property disputes." No. 11-cv-01846-LHK (N.D.
 16 Cal.), Dkt. No. 1395, at 3.

17 In short, the confidential terms of the license agreements that will be presented at trial
 18 constitute trade secrets within the Ninth Circuit's definition. *See, e.g., In re Elec. Arts*, 298 F.
 19 App'x at 569-70; *see also Clark*, 453 F.2d at 1009 ("[A] detailed plan for the creation, promotion,
 20 financing, and sale of contracts" constitutes a trade secret); *TriQuint*, 2011 WL 6182346, at *3-7
 21 (sealing documents containing sensitive financial information and licensing information);
 22 *Powertech Tech.*, 2012 WL 3283420, at *9 (sealing details of license agreement); *Abaxis, Inc. v.*
 23 *Cepheid*, No. 10-CV-02840-LHK, 2011 WL 6002522, at *1 n.1 (N.D. Cal. Nov. 30, 2011)
 24 (granting motion to seal exhibit to dispositive motion containing term sheet of licensing
 25 negotiations). Due to the presence of highly confidential information throughout the licenses, those

26
 herewith.

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 SEATTLE, WASHINGTON 98104-2682
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 Fax: (206) 676-7001

1 licenses, and any summary exhibits disclosing the terms of such licenses, as well as exhibits including
 2 information relating to the negotiation of these licenses, should be sealed in their entirety.⁹

3 **B. Exhibits That Include Past and Projected Sales and Revenue Data**

4 Motorola anticipates that the parties may seek to introduce evidence regarding both highly
 5 confidential past sales and revenue data for Motorola, as well as highly confidential future sales
 6 and revenue projections for Motorola products. Such evidence is included in Exhibits 2454-2463,
 7 2469-2476, 2730, 2756, and 3169, and is summarized in Exhibit 3333, and will likely be
 8 addressed primarily through the testimony of Motorola expert witness Dr. Michael Dansky and
 9 Microsoft expert witness Dr. Matthew Lynde. Disclosure of this evidence, and in particular
 10 disclosure of Motorola's sales and revenue projections, would have the potential to lead to
 11 competitive harm by creating an asymmetry of information between Motorola and competitors,
 12 whose sales and revenue results and projections are not public. (Blasius Decl. ¶¶ 18-20.) More
 13 importantly, Motorola's competitors would be able to use this information to discern and
 14 anticipate Motorola's past and future confidential business and marketing strategies, and to
 15 evaluate the success of those confidential strategies. (*Id.* ¶ 19.) For example, competitors might
 16 target Motorola through advertising, or might adjust their own marketing strategies in order to
 17 undercut the parties' anticipated revenues and sales. (*Id.*) This would provide these parties with
 18 an unfair competitive advantage.

19 Past and future sales and revenue data constitutes trade secrets under the Ninth Circuit's
 20 definition; the competitive harm that would result from disclosure of this information therefore
 21 outweighs the compelling interest in having the judicial proceedings open to the public.
 22 Accordingly, any exhibits that include this information should be sealed. *See, e.g., Clark*, 453
 23 F.2d at 1009 (quoting *Restatement of Torts* § 757, cmt. b); *In re Elec. Arts*, 298 F. App'x at 569-

24
 25 ⁹ Indeed, this Court has previously concluded that there was "compelling reason" to seal "descriptions of
 26 Motorola's licensing negotiations and agreements with third parties" (Dkt. No. 292 at 3) and a copy of a licensing
 agreement between Motorola and a third party that has been marked as containing confidential business information,
 (*id.* at 3-4).

1 70; *Bauer Bros.*, 2012 WL 1899838, at *2-4 (sealing declarations and documents containing cost
 2 analysis relating to sales and business data and product development plans); *Bean*, 2012 WL
 3 1078662, at *5-6 (sealing “precise revenue results” and “exact sales and production numbers,” in
 4 charts summarizing defendant’s sales and revenue figures broken out by product).

5 **C. Exhibits That Relate To Settlement Negotiations Between Motorola and Microsoft**

6 Motorola anticipates that at trial there may be discussion of or submission of documents
 7 relating to highly confidential settlement negotiations between Microsoft and Motorola. By a
 8 November 12, 2010 Non Disclosure Agreement between Motorola and Microsoft, which itself is
 9 designated as “Confidential Business Information, Subject to Protective Order,” the parties agreed
 10 to keep such negotiations confidential. (See Dkt. No 452.) These negotiations are summarized in
 11 Exhibit 3335. Public disclosure of such negotiations would negatively affect Motorola and
 12 Microsoft in future settlement negotiations by permitting competitors and potential counterparties
 13 to such negotiations to enter those negotiations with unfair insight into Motorola’s and Microsoft’s
 14 business and licensing strategies, proposed licensing terms, and cost/benefit analyses. (Blasius
 15 Decl. ¶ 22.) Because public disclosure of these documents would thus have the potential to lead to
 16 an unfair business advantage and competitive harm, these documents are trade secrets within the
 17 Ninth Circuit definition. See, e.g., *Clark*, 453 F.2d at 1009 (quoting *Restatement of Torts* § 757,
 18 cmt. b); *In re Elec. Arts*, 298 F. App’x at 569-70. Additionally, the competitive harm that would
 19 result from disclosure of this information outweighs the compelling interest in having the judicial
 20 proceedings open to the public. Accordingly, information, including information contained in
 21 summary exhibits, relating to such negotiations should be sealed in its entirety.

22 **D. Exhibits That Include Prior Sealed Testimony and Sealed Reports From Related
 23 Actions**

24 Motorola anticipates that at trial the parties may seek to enter into evidence sealed
 25 testimony or sealed reports from parallel or related actions that contain information about the
 26 parties’ highly sensitive and confidential licensing and business practices and strategies. For
 example, Exhibits 2860 and 2900 are copies of the direct and rebuttal testimony of Kirk Dailey and

were marked as Hearing Exhibits CX-715C and CX-778C and admitted into evidence as a Confidential Hearing Exhibits in *In The Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.). Throughout this testimony, which was marked as “confidential” under the terms of the Protective Order in this case, Mr. Dailey disclosed highly confidential information about Motorola’s licenses, licensing history and internal business practices. On April 24, 2012, this Court concluded that these documents were among several that “contain[ed] information about Motorola’s licenses, licensing history, internal business practices, and/or legal practices” such that they were “sufficiently confidential to meet the ‘compelling reasons’ standard.” (Dkt. No. 294 at 3.) As another example, Exhibits 2897 and 2924 are selected pages from the confidential expert report and deposition transcript of Louis P. Berneman, from *In the Matter of Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. No. 337-TA-744 (U.S.I.T.C.). In his report and during his testimony, both of which were designated as “confidential” under the Protective Order in the 337-TA-744 Investigation and under the Protective Order in this case, Mr. Berneman discussed confidential licensing information, disclosure of which would have the potential to lead to competitive harm. Both of these documents have previously been submitted to the Court as exhibits to dispositive motions (see Dkt. Nos. 273, 363), and both have been sealed by the Court under the “compelling reasons” standard, (see Dkt. Nos. 336 and 384).

As the Court has observed, (see Dkt. No. 294 at 3), such sealed testimony “containing Motorola’s licenses, licensing history, internal business practices, and/or legal practices” is “sufficiently confidential to meet the ‘compelling reasons’ standard.” Accordingly, to the extent such documents contain highly confidential trade secrets and licensing information, the Court should order those documents sealed for the reasons discussed above.

E. Exhibits That Include Confidential Third-Party Technical Information

Motorola anticipates that at trial the parties may seek to enter into evidence exhibits that include confidential third-party technical information. Such evidence is included in: Exhibit 84,

1 which is a confidential datasheet produced under protective order in the ITC describing the
 2 operation of a Marvell Wi-Fi chip; Exhibit 524, which is a confidential datasheet for that Marvell
 3 Wi-Fi chip; and Exhibit 3343, a confidential datasheet for an Atheros Wi-Fi chip. The data sheets,
 4 which were produced pursuant to a subpoena and which are marked “DO NOT COPY,”
 5 “CONFIDENTIAL BUSINESS INFORMATION,” COMPANY CONFIDENTIAL,”
 6 “CONFIDENTIAL,” and “PROPRIETARY,” provide hundreds of pages of detailed proprietary and
 7 highly confidential information concerning the function, structure and operation of Marvell’s and
 8 Atheros’s chips. Disclosure of the details of these products at this level of specificity provides
 9 competitors with highly sensitive information that would enable those competitors to copy numerous
 10 aspects of Marvell’s and Atheros’s proprietary and confidential engineering.

11 Public disclosure of this sort of confidential detailed technical information could thus give the
 12 competitors of these parties and third parties opportunities to gain an unfair commercial advantage.
 13 Accordingly, these exhibits – which are akin to proprietary source code – are trade secrets. *See*
 14 *Clark*, 453 F.2d at 1009 (quoting *Restatement of Torts* § 757, cmt. b); *see also In re Elec. Arts*, 298
 15 F. App’x at 569-70; *cf. Agency Solutions.Com, LLC v. TriZetto Group, Inc.*, 819 F. Supp. 2d 1001,
 16 1017 (E.D. Cal. 2011) (“[S]ource code is undoubtably[sic] a trade secret . . .”). The competitive
 17 harm that would result from disclosure of this information therefore outweighs the compelling
 18 interest in having the judicial proceedings open to the public. These exhibits, and these sorts of
 19 exhibits, should therefore be sealed.

20 **F. Exhibits That Include Party and Third-Party Depositions Disclosing Confidential
 21 Information**

22 Motorola anticipates that at trial the parties will either submit to the Court or seek to enter
 23 into evidence portions of the transcripts of depositions of both party and third-party witnesses. By
 24 agreement of the parties, a number of witnesses, including at least Aaron Bernstein, Scott Brewer,
 25 David Curtis, Timothy Kowalski, Allen Lo, Scott Peterson, Richard Sonnentag, and K. McNeill
 26 Taylor, will appear at trial by designation. (*See* Dkt. No 493.) According to the parties’ Pretrial
 Order, these witnesses will testify on issues including Motorola’s licensing activities, Motorola’s

1 patent licensing practices, Symbol Technologies' licensing practices, and Google's patent
 2 licensing activities and intellectual property licensing policies. (*See id.* at 13-19.) Motorola
 3 anticipates that much of the testimony that the parties offer through deposition designation will
 4 thus address highly confidential party and non-party trade secrets, disclosure of which would have
 5 the potential to lead to competitive harm. *See, e.g., In re Elec. Arts*, 298 F. App'x at 569-70;
 6 *Clark*, 453 F.2d at 1009; *TriQuint*, 2011 WL 6182346, at *3-7 (sealing documents containing
 7 sensitive financial information and licensing information); *Powertech Tech.*, 2012 WL 3283420,
 8 at *9 (sealing details of license agreement); *Abaxis, Inc. v. Cepheid*, 2011 WL 6002522, at *1 n.1
 9 (N.D. Cal. 2011) (granting motion to seal exhibit to dispositive motion containing term sheet of
 10 licensing negotiations). Indeed, this Court has already sealed a number of these depositions,
 11 which contain such information, and which have been submitted as exhibits to dispositive
 12 motions, and thus that fall under the "compelling reasons" standard. (*See, e.g.*, Dkt. No. 294
 13 (finding "compelling reasons" to seal the deposition of K. McNeill Taylor); Dkt. No. 336 (sealing
 14 excerpts of the rough transcript of the deposition of Aaron B. Bernstein); Dkt. No. 337 (sealing
 15 excerpts of the deposition of Timothy M. Kowalski); Dkt. No. 338 (sealing excerpts of the
 16 deposition of Richard A. Sonnentag).) Accordingly, to the extent that the deposition designations
 17 include such confidential information, the depositions should be sealed.¹⁰

18 Motorola also anticipates that, during cross-examination of witnesses who will appear at
 19 trial in person, the parties may seek to introduce into evidence portions of witness depositions.
 20 Many of the depositions taken in this action of both fact and expert witnesses contain highly
 21 confidential information about the parties' licensing and business practices and strategies,
 22 disclosure of which would have the potential to lead to competitive harm. Accordingly, to the
 23
 24

25
 26 ¹⁰ Motorola proposes that the parties work together to determine which portions of these deposition designations
 include information that should be sealed. As the Court wishes, the parties can then either submit redacted versions of
 the deposition designations or non-redacted versions identifying confidential information.

1 extent that the portions of depositions introduced at trial include such confidential information, the
 2 depositions should be sealed.¹¹

3 **G. Trial Testimony Regarding or Disclosing Confidential Information**

4 Motorola anticipates that the parties will seek to elicit testimony from both fact and expert
 5 witnesses regarding highly confidential Motorola and third-party information, including sensitive
 6 financial information, detailed information on licenses and licensing terms, and information
 7 regarding confidential negotiations between the parties. For example, based upon the expert
 8 reports and depositions, Motorola anticipates that, among other witnesses, Motorola fact witness
 9 Kirk Dailey, Microsoft expert Matthew Lynde, and Motorola expert Charles Donohoe will be
 10 asked to testify extensively regarding the terms (including pricing terms, royalty rates, and
 11 guaranteed minimum payment terms) of Motorola's licenses with third parties. Such testimony
 12 would necessarily be about "information that plainly falls within the definition of 'trade secrets.'"

13 *See In re Elec. Arts, 298 F. App'x at 569-70.*

14 The Court has previously concluded that there was "compelling reason" to seal "descriptions
 15 of Motorola's licensing negotiations and agreements with third parties" (Dkt. No. 292 at 3; *see*
 16 *also* Dkts. 384 and 385) and a copy of a licensing agreement between Motorola and a third party
 17 that has been marked as containing confidential business information, (Dkt. No. 292 at 3-4).
 18 Testimony about such confidential information should be treated in like fashion. Accordingly,
 19 unauthorized persons should be excluded from the courtroom throughout the entirety of Mr.
 20 Donohoe's testimony, Mr. Dailey's testimony, and Dr. Lynde's testimony. Motorola proposes
 21 that, following the trial, the parties submit to the Court proposed redactions of the transcript of the
 22 testimony offered by these three witnesses (as well as the others discussed below), and that the
 23 Court retain under seal only those portions for which there is "compelling reason" to seal.

24
 25 ¹¹ Because it may not be clear until during cross-examination which portions of which depositions the parties will
 26 seek to introduce into evidence, Motorola proposes that the Court accept depositions that have been designated as
 "Confidential" under seal, and that the parties be required to provide proposed redactions to those exhibits by the next
 morning of trial.

1 Motorola also anticipates that Microsoft expert witness Kevin Murphy and Motorola expert
 2 witness Roger Smith may testify as to the terms of Motorola's existent and past patent licenses,
 3 which Dr. Murphy addressed in his expert reports and described in Exhibit 4 to his opening expert
 4 report. For the same reasons unauthorized persons should be excluded from the courtroom
 5 throughout the entirety of the testimony of Mr. Donohoe, Mr. Dailey, and Dr. Lynde, unauthorized
 6 persons should be excluded from the courtroom during whatever portion of Dr. Murphy's
 7 testimony or Mr. Smith's testimony addresses this confidential licensing information.

8 Motorola anticipates that Motorola expert witness Michael Dansky will testify about
 9 Motorola's past and projected sales and revenue data, which is discussed extensively in his expert
 10 reports, and which is included in at least Exhibits 2454-2463, 2469-2476, 2730, 2756, 3169, and
 11 3333. As previously noted, disclosure of this information would have the potential to lead to
 12 competitive harm by creating an asymmetry of information between Motorola and competitors,
 13 whose sales and revenue results and projections are not public, and would allow party competitors
 14 to discern and evaluate Motorola's past and future confidential business and marketing strategies.
 15 This evidence constitutes trade secrets under the Ninth Circuit's definition. *See, e.g., Clark*, 453
 16 F.2d at 1009 (quoting *Restatement of Torts* § 757, cmt. b); *In re Elec. Arts*, 298 F. App'x at 569-
 17 70; *see also Bean*, 2012 WL 1078662, at *5-6 (sealing "precise revenue results" and "exact sales
 18 and production numbers," in charts summarizing defendant's sales and revenue figures broken out
 19 by product). As previously noted, the competitive harm that would result from disclosure of this
 20 information outweighs the compelling interest in having the judicial proceedings open to the
 21 public. Accordingly, unauthorized persons should be excluded from the courtroom during
 22 whatever portion of Mr. Dansky's testimony relates to this information and the other categories of
 23 information discussed above.

24 **H. Other Exhibits and Trial Testimony**

25 Motorola cannot fully anticipate all exhibits that will be used by both parties and the
 26 testimony that will be adduced at trial that includes Motorola and third-party trade secrets. As

1 public disclosure of such trade secrets would have the potential to lead to competitive harm, and as
 2 the competitive harm that would result from disclosure of this information would outweigh the
 3 compelling interest in having the judicial proceedings open to the public, unauthorized persons
 4 should be excluded from the courtroom during testimony regarding such trade secrets, and the
 5 testimony and exhibits should be sealed. Similarly, the trial transcripts should be redacted so as to
 6 keep party and non-party trade secrets from public disclosure.

7 **V. CONCLUSION**

8 For the foregoing reasons, Motorola respectfully requests that this Court order sealed trial
 9 exhibits and summary exhibits that contain information about Motorola's and third parties'
 10 sensitive financial information, licensing practices and history, and business strategies, that the
 11 Court order that unauthorized persons be excluded from the courtroom during testimony about
 12 such confidential information, and that the Court seal the portions of the trial transcripts
 13 containing that confidential information. As noted above, to the extent that it is not possible to say
 14 with certainty in advance which documents the parties will use, Motorola suggests that the Court
 15 permit the parties to submit, no later than 8:00 AM each morning of trial, copies of exhibits it
 16 anticipates using that day, that it is seeking to seal, and that have not previously been submitted to
 17 the Court in a Motion to Seal, together with specifics regarding the basis for sealing, so that the
 18 Court may consider and rule on the exhibits at that time. Motorola similarly proposes that, should
 19 a party seek to use on cross-examination an exhibit it did not anticipate entering into evidence and
 20 that either party believes should be sealed, that the Court accept that exhibit on a sealed basis, and
 21 permit the parties to submit, no later than 8:00 AM the next morning of trial, specifics regarding
 22 the basis for sealing, so that the Court may consider and rule on the exhibit at that time.

1 DATED this 29th day of October, 2012.

2 SUMMIT LAW GROUP PLLC

3 By /s/ Ralph H. Palumbo

4 Ralph H. Palumbo, WSBA #04751
5 Philip S. McCune, WSBA #21081
6 Lynn M. Engel, WSBA #21934
7 *ralphp@summitlaw.com*
8 *philm@summitlaw.com*
9 *lynne@summitlaw.com*

10 By /s/ Thomas V. Miller

11 Thomas V. Miller
12 MOTOROLA MOBILITY LLC
13 600 North U.S. Highway 45
14 Libertyville, IL 60048-1286
15 (847) 523-2162

16 And by

17 Jesse J. Jenner (*pro hac vice*)
18 Steven Pepe (*pro hac vice*)
19 Kevin J. Post (*pro hac vice*)
20 Ropes & Gray LLP
21 1211 Avenue of the Americas
22 New York, NY 10036-8704
23 (212) 596-9046
24 *jesse.jenner@ropesgray.com*
25 *steven.pepe@ropesgray.com*
26 *kevin.post@ropesgray.com*

James R. Batchelder (*pro hac vice*)
Norman H. Beamer (*pro hac vice*)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
(650) 617-4030
james.batchelder@ropesgray.com
norman.beamer@ropesgray.com

Paul M. Schoenhard (*pro hac vice*)
Ropes & Gray LLP
One Metro Center
700 12th Street NW, Suite 900
Washington, DC 20005-3948
(202) 508-4693
paul.schoenhard.@ropesgray.com

27 *Attorneys for Motorola Solutions, Inc., Motorola*
28 *Mobility LLC and General Instrument Corp.*

DEFENDANTS' MOTION TO SEAL DOCUMENTS AND
TRIAL TESTIMONY AND EXCLUDE UNAUTHORIZED
PERSONS FROM THE COURTROOM DURING TESTIMONY
REGARDING TRADE SECRETS - 19
CASE NO. C10-1823-JLR

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Arthur W. Harrigan, Jr., Esq.
Christopher T. Wion, Esq.
Shane P. Cramer, Esq.
Calfo Harrigan Leyh & Eakes LLP
arthurh@calfoharrigan.com
chrisw@calfoharrigan.com
shanec@calfoharrigan.com

Richard A. Cederoth, Esq.
Brian R. Nester, Esq.
David T. Pritikin, Esq.
Douglas I. Lewis, Esq.
John W. McBride, Esq.
David Greenfield, Esq.
William H. Baumgartner, Jr., Esq.
David C. Giardina, Esq.
Carter G. Phillips, Esq.
Constantine L. Trela, Jr., Esq.
Ellen S. Robbins, Esq.
Nathaniel C. Love, Esq.
Sidley Austin LLP
rcederoth@sidley.com
bnester@sidley.com
dpritikin@sidley.com
dilewis@sidley.com
jwmcbride@sidley.com
david.greenfield@sidley.com
wbaumgartner@sidley.com
dgiardina@sidley.com
cphillips@sidley.com
ctrela@sidley.com
erobbins@sidley.com
nlove@sidley.com

T. Andrew Culbert, Esq.
David E. Killough, Esq.
Microsoft Corp.
andrycu@microsoft.com
davkill@microsoft.com

DATED this 29th day of October, 2012.

/s/ Marcia A. Ripley
Marcia A. Ripley

DEFENDANTS' MOTION TO SEAL DOCUMENTS AND
TRIAL TESTIMONY AND EXCLUDE UNAUTHORIZED
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SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001